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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/028,225	12/18/2001	Gerhard Engel	DE920000112US1	3157

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IBM CORPORATION  
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EXAMINER

PHILLIPS, HASSAN A

ART UNIT PAPER NUMBER

2151

DATE MAILED: 06/07/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/028,225

Applicant(s)

ENGEL ET AL.

Examiner

Hassan Phillips

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 13 February 2004.  
2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.  
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-11 is/are pending in the application.  
4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.  
5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.  
6) ☒ Claim(s) 1-11 is/are rejected.  
7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.  
8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.  
10) ☒ The drawing(s) filed on 18 December 2001 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
11) ☒ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☒ All b) ☐ Some \* c) ☐ None of:  
1. ☒ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)  
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)  
3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date 2/13/04.  
4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.  
5) ☐ Notice of Informal Patent Application (PTO-152)  
6) ☐ Other: \_\_\_\_\_.

## **DETAILED ACTION**

### ***Oath/Declaration***

1. The oath or declaration is defective. A new oath or declaration in compliance with 37 CFR 1.67(a) identifying this application by, application number and filing date is required. See MPEP §§ 602.01 and 602.02.

The oath or declaration is defective because: the date given for the prior foreign application number 00128018.9, in which priority is claimed, is incorrect.

### ***Claim Rejections - 35 USC § 102***

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

3. Claim 9 is rejected under 35 U.S.C. 102(a) as being anticipated by Applicants Admitted Prior Art (AAPA).

4. In considering claim 9, Applicant admits it was well known in the art to have a software distribution system for remote distribution/installation of computer programs from a source data processing system to at least one target data processing system based on at least two distribution/installation modes, wherein the computer programs are transferred as packages which are identified in a package list, the system

comprising a queue manager which includes a request queue and an active queue for handling the remote distribution, (see Applicants disclosure page 1, line 11 through page 4, line 6).

***Claim Rejections - 35 USC § 103***

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 1, 8, are rejected under 35 U.S.C. 103(a) as being unpatentable over AAPA, in view of Moshir et al., (hereinafter Moshir), U.S. Patent Pub. No. 2002/0100036.

7. In considering claims 1 and 8, AAPA teaches a method for remote distribution/installation of computer programs from a source data processing system to at least one target data processing system based on at least two distribution/installation modes, comprising the steps of: checking if the at least one target data processing system is available and performing the distribution/installation according to one of the at least two distribution/installation modes, if the at least one target data processing system is available, (see Applicants disclosure page 2, line 8 through page 4, line 6).

Although the teachings of the AAPA disclose substantial features of the Applicants claimed invention, they fail to teach: switching modes of distribution/installation if one mode is not successful.

Nevertheless, in a similar field of endeavor, Moshir teaches an automatic software updating system and method comprising: monitoring if a distribution/installation is successful, and switching the distribution/installation mode if the distribution/installation is not successful, (page 5, paragraph 61).

Given the teachings of Moshir, it would have been obvious to one of ordinary skill in the art at the time of the claimed invention to modify the teachings of the AAPA in order to switch modes of distribution/installation if one mode is not successful. This would have increased the chances for successfully distributing/installing computer programs from a source processing system to at least one target processing system in a timely fashion, (Moshir, page 5, paragraph 61, and page 1, paragraph 12).

8. Claims 2-4, 6-7, are rejected under 35 U.S.C. 103(a) as being unpatentable over AAPA and Moshir in view of Hubinette, U.S. Patent 6,289,511.

9. In considering claim 2, although the disclosed teachings of AAPA and Moshir show substantial features of the claimed invention, they fail to expressly disclose: pre-specifying attempt numbers for retrying a mode of distribution, or rescheduling a mode of distribution.

Nevertheless, in a similar field of endeavor Hubinette teaches a method and system for distributing software in a telecommunications network comprising: prespecifying attempt numbers for retrying a mode of distribution, and rescheduling a mode of distribution, (col. 8, lines 4-10).

Given the teachings of Hubinette, it would have been obvious to a person of ordinary skill in the art at the time of the present invention to modify the teachings of AAPA in view of Moshir in order to pre-specify attempt numbers for retrying a push mode distribution and pull mode distribution. It would have also been obvious to a person of ordinary skill in the art at the time of the present invention to modify the teachings of AAPA in view of Moshir to teach if at least one push mode attempt is left, resume and reschedule a next push mode distribution and, if no push mode attempt is left, but at least one pull mode attempt is left, resuming and rescheduling a next pull mode distribution. This would have increased the chances for successfully distributing/installing computer programs from a source processing system to at least one target processing system in a timely fashion, minimizing the total update time for the distribution/installation of computer programs, (Hubinette, col. 8, lines 32-34).

10. In considering claims 3, 6, and 7, the combined teachings of the AAPA, Moshir, and Hubinette provide a means for wherein if the target data processing system is not available after several retries, performing the further particular steps of: if the number of push retries is greater than 0, moving a distribution/installation request into a hold queue and scheduling re-insertion of the request into a request queue, (Applicants

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disclosure page 1, line 11 through page 4, line 6, and Hubinette, col. 8, lines 4-10); if the number of push retries is equal 0 and the number of pull retries is greater than 0, moving the request into a pull queue and restarting when the target computer system logs in, (Applicants disclosure page 1, line 11 through page 4, line 6, and Hubinette, col. 8, lines 4-10); and if the number of push retries is equal 0 and the number of pull retries is equal 0, moving the request into an abort queue, (Applicants disclosure page 1, line 11 through page 4, line 6, and Hubinette, col. 7, lines 65, through col. 8, line 20). One of ordinary skill in the art would combine AAPA, Moshir, and Hubinette for the reasons indicated in consideration of claims 1 and 2.

11. In considering claim 4, AAPA provides a means for queuing a distribution/installation request in a request queue and setting the distribution/installation request into an active queue when a pre-specified time is exceeded, (see Applicants disclosure page 1, line 11 through page 4, line 6).

12. Examiner takes Official Notice (see MPEP § 2144.03) for claims 5, 10 and 11.

13. In considering claims 5 and 10, although the combined teachings of the AAPA, Moshir, and Hubinette show substantial features of the claimed invention, they fail to expressly disclose: detecting an active queue overload.

Nevertheless, Examiner takes Official Notice that "detecting an active queue overload" in a computer networking environment was well known in the art at the time the invention was made. Thus, if not implicit in the teachings of AAPA, it would have been obvious to modify the teachings of the AAPA to show detecting an active queue overload. This would have prevented unnecessary errors from occurring during the distribution/installation of computer programs.

14. In considering claim 11, the AAPA provides a means for the queue manager to check if a current target data processing system is already active and, if not for setting the request into the active queue, (see Applicants disclosure page 1, line 11 through page 2, line 7).

### ***Conclusion***

15. The Applicant is entitled to traverse any/all official notice taken in this action according to MPEP § 2144.03, namely, "if applicant traverses such an assertion, the examiner should cite a reference in support of his or her position". However, MPEP § 2144.03 further states "See also *In re Boon*, 439 F.2d 724, 169 USPQ 231 (CCPA 1971) (a challenge to the taking of judicial notice must contain adequate information or argument to create on its face a reasonable doubt regarding the circumstances justifying the judicial notice)." Specifically, *In re Boon*, 169 USPQ 231, 234 states "as we held in *Ahlert*, an applicant must be given the opportunity to challenge either the correctness of the fact asserted or the notoriety or repute of the reference cited in



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support of the assertion. We did not mean to imply by this statement that a bald challenge, with nothing more, would be all that was needed". Further note that 37 CFR § 1.671(c)(3) states "Judicial notice means official notice". Thus, a traversal by the Applicant that is merely "a bald challenge, with nothing more" will be given very little weight.

16. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Hassan Phillips whose telephone number is (571) 272-3940. The examiner can normally be reached on M-F 8:00am-5:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Zarni Maung can be reached on (571) 272-3939. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

HP/  
5/27/05

  
ZARNI MAUNG  
SUPERVISORY PATENT EXAMINER